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ABSTRACT

Recent legal developments concerning college students and colleges and universities are summarized, with a focus on constitutional issues related to the rights of students to organize, the collection and allocation of mandatory student activity fees, and the protection of freedom of speech regarding commercial enterprises. The status of educational malpractice and implications for policy and practice are considered. Guidelines are included on students' First Amendment rights and ways to balance the constitutional rights of students and the prerogatives of the institution in regard to speech-related activities of student organizations. Consideration is given to court rulings concerning commercial solicitation, a form of commercial speech. Four requirements that must be satisfied to ensure implementation of free expression by vendors are identified, based on Supreme Court decisions about restrictions regarding time, place, and manner of individual expression. Policy considerations are briefly addressed concerning staff peer review and the integrity of faculty evaluation, diagnostic procedures used by colleges, and information contained in college catalogs and other publications. (SW)

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ERIC DIGEST

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The College, the Constitution, and the Consumer Student

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U.S. DEPARTMENT OF EDUCATION
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The relationship between student and college is at the heart of college education. At one time, the relationship was largely taken for granted or subsumed under a nonspecific motion of in loco parentis in which the college was the principle determiner of the educational environment. Since 1960, however, this relationship has changed, and today these multifaceted relationships, described as fiduciary, contractual, and constitutional, take the form of rights defined by the Constitution or by the student as consumer.

Litigation involving the constitutional relationship has moved from an emphasis on individual rights in the 1960s and 1970s to First Amendment rights of association and freedom of religion as they affect student organizations in the late 1970s and 1980s. Another first Amendment issue — commercial speech — has also been defined during the last several years.

Issues involving contractual and fiduciary relationships have been litigated as torts based on negligence, breach of contract, or educational malpractice. The novel consumer litigation lies in the area of educational malpractice, and adequate litigation exists to plot some future directions and trends. Consumer protection has become more important than in the past, and colleges find themselves struggling to design policies that are both consumer focused and preserve past policies appropriate for their primary mission.

What Rights Do Student Organizations Have on Campus?

Administrators of public colleges and universities are bound by the First and Fourteenth Amendments to ensure that rights and privileges are extended to *all* student groups equally and fairly. Administrators of private colleges, while not bound legally by constitutional considerations, may find less conflict acknowledging rights and freedoms required of public colleges by the Constitution, particularly at this time, when American society places a great deal of importance on those rights.

While speech-related activities of student organizations are constitutionally protected, they are subject, however, to some regulation as a result of the special characteristics of the school environment. In balancing the constitutional rights of students and the prerogatives of the institution, administrators must ensure that:

- Freedom of *speech* is guaranteed, but *behavior* is subject to regulation.
- Behavior that interferes with or disrupts the normal activities of the institution or the rights of others is subject to regulation.
- Regulation of time, place, and manner is lawful for maintaining the proper educational environment of the college or university.
- Once some groups or organizations have been recognized by the institution, *all* groups must be accorded such status, provided they meet the same lawful procedural and substantive requirements.
- Religious speech must be treated as secular speech as it relates to recognition of student organizations and policies regarding the use of institutional facilities.

What Issues Surround the Collection and Allocation of Mandatory Student Activity Fees?

Major legal challenges to mandatory student fees have alleged that certain uses

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of the fees violate students' constitutionally protected rights to freedom of religion or freedoms to associate, speak, and express themselves. In both areas, the courts have deferred to administrative discretion, balancing the interests of colleges and universities in the use of the fees against students' First Amendment rights.

College administrators should thus structure fee systems to ensure the presence of as many of the following characteristics as possible:

- The group receiving funds is an institutionally dependent, on-campus organization.
- The primary purpose or activity of the group receiving funds is educational — not political — and the group permits expression of a wide range of views.
- The funding mechanism is one to which all on-campus groups have equal access.
- The fee system allows a maximum amount of discussion, approval, or objection by students at the outset, before fees are ever exacted.
- The institutional student activity fee must support a broad forum of ideas and activities, while not promoting or hindering expression of any particular view.

It is unlikely that an absence of any one of these characteristics will make a mandatory fee system stand or fall. Absent clear direction from the courts on the issue and a controlling Supreme Court decision, however, implementation of a fee system with as many of these guidelines as possible is likely to be the best course for avoiding legitimate disruptive student dissent and costly, time-consuming litigation.

What Rights Do Vendors Have on Campus?

The First Amendment's freedom of speech is not absolute. To ensure the implementation of free expression, the Supreme Court has determined that restrictions regarding time, place, and manner of individual expression must satisfy four requirements: They must (1) be content neutral and (2) narrowly drawn, (3) serve a significant governmental interest, and (4) leave open alternative channels of communication. Commercial solicitation, as a form of commercial speech, is afforded less than the full array of constitutional safeguards for free speech.

The courts have ruled further that:

- Administrators may ban group commercial solicitation in students' residence hall rooms.
- College officials are well advised to prevent the use of residence hall rooms as merchandising marts by commercial vendors.
- A one-on-one demonstration and/or sale in a student's private room may be allowed *if the student invites the solicitor.*
- Institutions should provide some means for allowing commercial speech, information, and expression, including newspapers, mail, radio stations, and telephone, for example.
- Colleges and universities may prohibit any misleading or unlawful commercial activity.

What is the Status of Educational Malpractice?

The current disposition of the courts is not to encroach into some areas of the fiduciary relationship — specifically academic decision making — which includes, for the moment, educational malpractice. The courts refuse to recognize educational malpractice as a tort, because to do so would conflict with public policy. This disposition is consistent with the case law on academic dismissal.

Several policy considerations seem appropriate.

- The process for peer review and evaluation by department heads and supervisory administrators should be reviewed to ensure that incompetence and poor performance are not swept under the rug.
- Institutions should ensure that diagnostic procedures meet the practices and procedures accepted by professionals in the field when such standards are available.
- Review should be built into the process of awarding grades and certifying skills to protect against arbitrary and capricious decisions and, at the same time, to protect the academic integrity of the faculty evaluation process.
- Catalogs, bulletins, and other publications should be reviewed to ensure that they do not make guarantees beyond the institution's capabilities.

Selected References

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American Future Systems v. Pennsylvania State University, 553 F. Supp. 1268 (M.D. Pa. 1982); 568 F. Supp. 666 (M.D. Pa. 1983); *rev'd*, 752 F.2d 854 (3rd Cir. 1984); *cert. denied, Johnson v. Pennsylvania State University*, 105 S.Ct. 3537 (1985)

Gay Student Services v. Texas A&M University, 737 F.2d 1317 (5th Cir. 1984); *reh'g denied*, 105 S.Ct. 1860 (1985).

Nordin, Virginia D. 1982. "The Contract to Educate: Toward a More Workable Theory of the Student-Institutional Relationship." *Journal of College and University Law* 8(2): 141-81.

Swidryk v. St. Michael's Medical Center, 493 A.2d 641 (N.J. Super. Ct. Law Div. 1985).

Veed v. Schwartzkopf, 353 F. Supp. 149 (D. Neb. 1973); *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973); *cert. denied*, 414 U.S. 1135 (1974).

While this monograph provides information essential to the development of educational policy, it is not a substitute for the advice of legal counsel.

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